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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Cable	)	MM Docket No. 92-259

Superstation Exception

New Section 325(b) of the 1992 Cable Act contains four exceptions to the retransmission consent requirement. The fourth exception applies to superstation retransmission by cable operators for other multi-channel video distributors, provided that the signal "was obtained from a satellite carrier and the originating station was a superstation as of May 1, 1991." In commenting on this exception, Newhouse and others pointed out to the Commission that satellite superstations are sometimes received by nearby cable systems using reception methods other than satellite. For example, there are regional microwave systems which deliver a number of services to cable systems, including a local superstation. Moreover, some cable systems are located close enough to a market where a superstation originates to receive these stations off the air. Newhouse argued that if the superstation exemption were interpreted as literally as the Commission proposed, such cable systems would be deemed ineligible for the superstation exemption. In its Report and Order, the Commission mentioned the argument made by Newhouse and rejected it, stating that its conclusion to require a superstation to actually be received via satellite for a cable system to be able to utilize the exception was supported by the plain language of the statute.[1]

Newhouse submits that the Commission has elevated form over substance. In enacting the retransmission consent scheme, Congress was sensitive to the possibility that certain established

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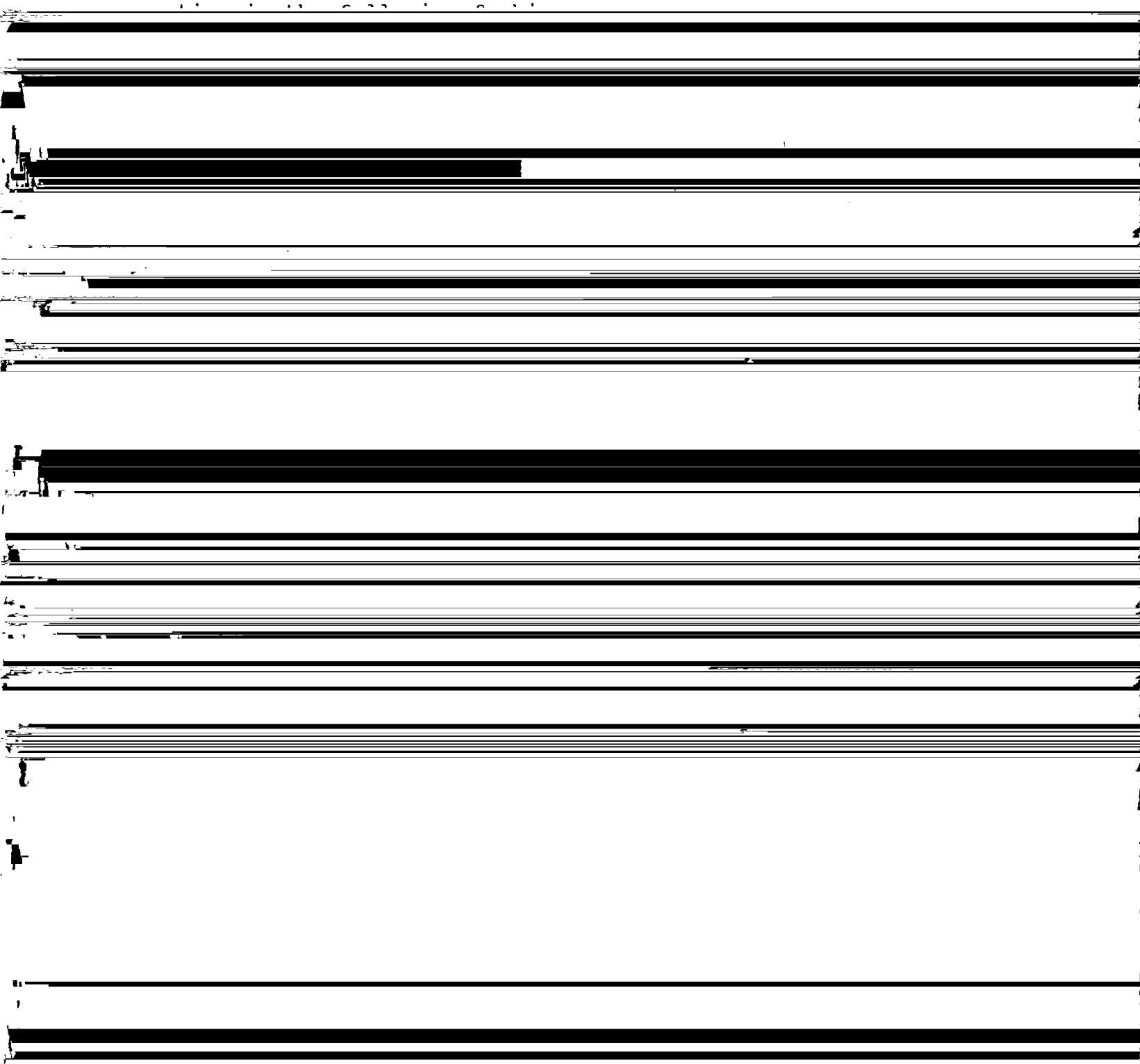
[1]Report and Order, ¶ 142.

in Section 325(b) certainly can be read that way, but it can also be read in the way which Newhouse advocates. More importantly, however, Newhouse's reading is more consistent with the intent of the provision as expressed in the Senate Report. It is also instructive that the Senate Report's own sectional analysis describes this



program suppliers and broadcast stations can supersede the retransmission consent rights newly given to broadcasters by Section 325(b) of the 1992 Cable Act. Newhouse took the position in its comments that the only way to implement retransmission consent in a manner that leaves both the compulsory license and existing or future programming contracts intact is to allow broadcasters complete freedom to negotiate retransmission consent with cable operators. This view necessarily means that the rights in the underlying programming are separate from the rights in the broadcast signal in which the programming is transmitted. In its Report and Order, the Commission essentially concurred with this viewpoint, although it did not hold that this new right is an inalienable right of the broadcaster. Thus, the Commission interpreted Section 325(b) as giving a new right to the broadcaster but allowing it to be bargained away in future programming contracts. Almost as a sidebar to this issue, the Commission had tentatively concluded in its Notice of Proposed Rulemaking that cable operators can contract with broadcasters to carry less than the entirety of the program schedule of retransmission consent stations. In its Report and Order, however, the Commission stated that it was persuaded that the "plain language" of Section 614(b)(3)(B), which requires cable operators to carry the entirety of the program schedule of any must-carry station, applies to retransmission consent stations as well.

This is an amazing ruling for a Commission which seems so wedded to a literal interpretation of the 1992 Cable Act. In the first place, Section 614 by its own terms applies only to must-carry stations. Section 614 does not mention Section 325(b). In fact, the

only relationship between Section 614 and Section 325(b) is the election between the two modes of achieving carriage which local television stations must make. The public policy reasons reflected in Section 614 for requiring the carriage of the entirety of the program schedule of any television station required to be carried (unless carriage of specific programming is prohibited by other Commission rules) is obvious and only carries out the public policy which the Commission itself has utilized in prior incarnations of its must-carry rules. However, Section 325(b) gives an entirely new right to broadcasters. It has nothing to do with must-carry, and there is no apparent public policy which mandates the same type of carriage requirement. Retransmission consent is supposed to be the result of a voluntary bargain between cable operator and broadcaster. To put constraints on retransmission consent without any clear statutory guidance is an arbitrary decision which does not serve the public policy which retransmission consent itself was designed to implement.

In ¶ 173 of its Report and Order, the Commission correctly

or the legislative history, it does not make good public policy sense and it is often simply wrong. Stations sometimes do own the programs they transmit, e.g., local news, or they may have purchased adequate rights from the program owner. Moreover, the Commission's holding runs counter to the overriding public policy favoring the widest possible dissemination of programming. One prime example is the imported carriage of non-cleared network programming. Under the Commission's prior carriage rules, even when the number of distant signals was limited, the Commission permitted a cable system to import network programming which had not been cleared by the local network affiliate.[4] Certainly that policy is as valid today as it was yesterday. A cable system which is able to obtain retransmission consent to import an uncleared program ought to be able to do so, particularly if the distant signal does not wish or is not able to give retransmission consent to its entire signal. Moreover, the Commission itself has cited this policy in a different context in its Report and Order. The Commission has stated that in unique situations such as Puerto Rico and the Virgin Islands, where a network or networks have no local affiliate in the market, it may not be reasonable for a network affiliate to refuse to grant retransmission consent.[5]

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[4]This public policy was carried forward by Congress when it enacted the Copyright Act of 1976. Under Section 111, cable systems are not required to pay any additional royalties for distant programming which represents the carriage of programming not cleared by a local network affiliate. 17 U.S.C. §111(f).

[5]Report and Order, ¶ 147.

Therefore, since there is a strong public policy in favor of the dissemination of programming to the greatest extent possible, it would indeed be a strained reading of the statute to deny a cable operator and a broadcaster the right to bargain for retransmission consent to programs which would not otherwise be receivable in the cable operator's community. The statute does not on its face prohibit this result. Nor does it run counter to the Commission's conclusion that the broadcaster's right in its signal is separate from the program owner's right to the programs which the broadcaster transmits. Newhouse urges the Commission to permit the grant of retransmission consent for those programs for which a broadcaster possesses the requisite authority.

Applicability of Retransmission Consent to Radio Stations

The Commission raised the question of whether retransmission consent applies only to television broadcast stations or whether the provision was intended to apply to radio stations as well. In its Report and Order, the Commission decided that the "plain language of Section 325(b)(1) and the legislative history cited by NAB" dictated a conclusion that radio is covered under the retransmission consent requirement. Newhouse respectfully requests the Commission to reconsider this conclusion.

The structure of the 1992 Cable Act and its legislative history indicate that retransmission consent was intended only to apply to television broadcast stations. The statute clearly indicates that the mandatory carriage and retansmission consent provisions are intended to work in concert. Yet, only television stations are granted must-carry rights by the 1992 Cable Act. This alone is a

persuasive indication that the retransmission consent provisions are also to apply only to television broadcasters. Indeed, the legislative history of the 1992 Cable Act makes clear that Congress intended the retransmission consent provisions to apply to television broadcasters only. Thus, the Senate Report states that "the committee has concluded that the exception to Section 325 for cable retransmissions has created a distortion in the video marketplace which threatened the future of over-the-air broadcasting."[6] Moreover, the Conference Report states that "in the proceeding implementing retransmission consent, the conferees direct the Commission to consider the impact that the grant of retransmission consent by television stations may have on the rates for the basic service tier . . . "[7]

The Commission seems to rely on NAB's research into the debate on the Radio Act of 1927. NAB argued that since the 1992 Cable Act

Commission to commence a rulemaking proceeding to establish rules and procedures to govern the retransmission consent provisions in tandem with the must-carry provisions of Section 614 of the Act. There is no mention anywhere in Section 325 about setting rules to govern retransmission consent for radio broadcast signals. There is a good reason for this. Section 325 was not intended to cover radio signals and the Commission should reconsider its decision to include radio stations under the umbrella of retransmission consent.

Respectfully submitted,

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Date: May 3, 1993
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